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Supreme Court, U.S.
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No. 04-345

IN THE

Supreme Court of the United States

BRADLEY J. DONAHUE,

Petitioner,

v.

THE CITY OF BOSTON; THE BOSTON POLICE DEPARTMENT; and PAUL F. EVANS, individually and in his official capacity as Commissioner of the BOSTON POLICE DEPARTMENT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the Court should deny the petition for writ of certiorari (the "Petition") where the legal underpinnings of the First Circuit's decision — that petitioner lacked standing for prospective relief — do not conflict with the decision of any other court of appeals or of this Court, and do not otherwise meet the standard for review set forth in Supreme Court Rule 10.

B. Whether the Court should deny the Petition where the First Circuit's decision that the district court did not abuse its discretion in limiting the scope of petitioner's Second Amended Complaint does not conflict with the decisions of any other court of appeals or of this Court, and does not otherwise meet the standard for review set forth in Supreme Court Rule 10.

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STATEMENT OF THE CASE

A. Introduction

There is no reason for the Court to grant certiorari over this matter. This case arose from petitioner's inability to obtain an appointment to the City of Boston Police Department (the "Department") and petitioner's erroneous assertion that he did not obtain such an appointment due to the operation of a federal court consent decree governing the Department's hiring practices. In the opinion at issue, the First Circuit affirmed the district court's finding that petitioner lacked standing to challenge future application of the consent decree. Based on the well-established law of this Court, the district court held, and the First Circuit affirmed, that petitioner could not show that he was "ready and able" to compete for a position with the Department because he exceeded the age limitation for appointment established by Mass. Gen. Laws ch. 31, § 58A ("Section 58A").[1] Furthermore, and again based on the well-established law of this Court, the district court held, and the First Circuit affirmed, that Section 58A did not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because the age limitation articulated by Section 58A is rationally related to a legitimate state interest. Accordingly, the decision below is not in conflict with the decisions of any other court of appeals or of this Court, it does not present any novel or unsettled questions, and no aspect of the First Circuit's opinion on the merits requires further review.

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1. The full text of Section 58A is set forth on p. 5a hereto as part of respondents' appendix.

Likewise, petitioner provides no basis for the Court to grant certiorari to review whether the First Circuit properly affirmed the district court's decision to limit the scope of petitioner's Second Amended Complaint. That decision is simply not in conflict with the decisions of any other court of appeals or of this Court and moreover, does not present a question of public importance that merits review by this Court.

B. Factual and Procedural History

To become a police officer with the Department, an individual must first pass a statewide civil service examination, which is administered by the Commonwealth of Massachusetts Human Resources Division ("HRD"). The Department's hiring procedures are governed in part by a consent decree that was entered by the federal district court in 1973 (the "consent decree"). *See Castro v. Beecher*, 365 F. Supp. 655, 661-62 (D. Mass. 1973). After HRD administers an examination, it compiles an "eligible list" of individuals who received a passing score on the examination and who are therefore eligible for appointment to a civil service position. In accordance with the terms of the consent decree, HRD alternates minority and non-minority candidates on the eligible list. The candidates are also ranked according to other factors not relevant here, such as whether they are veterans of the armed services. When hiring a new class of police officers, the Department notifies HRD of the number of positions it wishes to fill. HRD then certifies twice the number of persons requested plus one, selecting names from the eligible list in rank order. The Department has no role in the assembly of either the eligible or certification list. The Department must appoint candidates in order of their position on the certification list, unless it provides a reason for bypassing a candidate.

Petitioner aspired to become a police officer with the Department and sought appointment by taking the HRD civil service examination. He took the civil service examinations offered in April 1997 and May 1999, receiving passing scores of 92 and 96, respectively. On each occasion, he was placed on the eligible list but was not hired by the Department. On the April 1997 examination, 580 non-minority applicants had scored higher than petitioner but were not hired, while the eligible list created after the 1999 examination included 117 non-minority candidates between petitioner and the last non-minority appointee. On the 1997 examination, all minority candidates that were hired had a higher score than petitioner. On the 1999 examination, one minority candidate was hired despite having a lower score than petitioner.

On May 10, 2000, petitioner filed this lawsuit against respondents, the City of Boston, the Department, and Paul F. Evans, individually and in his official capacity as Commissioner of the Department (collectively, the "City"), alleging that the City violated petitioner's rights under the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. §§ 1981, 1983, and 1986, by failing to appoint him to the Department purportedly on the basis of his race. Petitioner asserted that he was impermissibly "barred" from obtaining an appointment to the Department because of the terms of the consent decree. Petitioner sought damages, and requested injunctive and declaratory relief against further operation of the consent decree.

On August 10, 2000, the Massachusetts legislature passed Section 58A, which provided that in any municipality adopting the law, no person who has reached the age of thirty-two on the date of a HRD civil service examination shall be eligible to have his or her name certified for "original

appointment" to a municipal firefighter or police officer position. 2000 Mass. Acts ch. 242 (codified at Mass. Gen. Laws. ch. 31, § 58A). The City adopted the provisions of Section 58A in December 2000.

On January 2, 2001, HRD sent petitioner (along with the other applicants who were planning to take the April 2001 civil service examination) a two-page notice, addressing the potential impact of Section 58A. The notice informed petitioner that the legislature had enacted Section 58A, as a local option statute, effective November 8, 2000, and set forth the language of Section 58A in its entirety. It informed petitioner that he would not be eligible for appointment to the police department of any municipality that had adopted Section 58A if he had reached his thirty-second birthday by the date of the next examination. The notice also alerted petitioner that the City may have accepted the provisions of Section 58A and encouraged him to contact the Department to determine if the provision had taken effect, which it had.

On April 26, 2001, while his case was pending in the district court, petitioner again sat for the statewide civil service examination, passing with a score of 100. On that date, petitioner had already reached the age of thirty-two.[2] As a result, pursuant to Section 58A HRD could not include petitioner's name on the eligible list or on the certification list that it transmitted to the Department on September 14, 2001.

On May 30, 2001, the City moved for summary judgment because petitioner lacked standing under Article III of the United States Constitution to challenge the consent

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2. Petitioner turned thirty-two on March 26, 2001.

decree and assert the claims set forth in his Complaint. On September 13, 2001, petitioner cross-moved for summary judgment claiming that the consent decree was unconstitutional. On October 30, 2001, petitioner moved for leave to amend his First Amended Complaint[3] to add an age discrimination challenge to Section 58A.[4]

In a memorandum and order dated December 13, 2001, the district court granted the City's motion for summary judgment. The court held that petitioner lacked standing both to seek damages and injunctive relief. *Donahue v. City of Boston*, 183 F. Supp. 2d 202, 209 (D. Mass. 2001). By orders entered December 14, 2001, the court denied as moot both

3 Petitioner's motion for leave to file his First Amended Complaint, dated March 13, 2001, was allowed by the district court.

4 On November 28, 2001, the Boston City Council passed a home rule petition to exempt from Section 58A any Boston resident who took the April 2001 civil service examination for appointment to the Department until his or her eligibility expired. Several months earlier, the Council had passed a home rule petition exempting from Section 58A applicants to the Boston Fire Department who, unlike the police officer candidates, took the 2000 civil service examination that was administered before the enactment of Section 58A. The firefighter's petition had been approved by the Mayor of Boston and enacted by the Massachusetts Legislature, as is required for such a petition to become law. *See* Mass. Const. amend. art. 2, § 8. The Mayor of Boston, however, did not approve the November 8, 2000 home rule petition, and thus it was never presented to or enacted into law by the Legislature. *See* Fifth Affidavit of Edward P. Callahan dated April 14, 2003 ("Callahan Aff. V"), ¶ 7, App. p. 4a ("[o]nce hiring was under way from the 2001 examination based on an eligible list that excluded candidates age 32 and over, it would have been administratively difficult and costly, in late 2001, to provide the exemption"). Therefore, no candidates for appointment to the Department were ever exempted from Section 58A.

petitioner's motion for summary judgment and his motion to amend the First Amended Complaint.

On appeal, the First Circuit affirmed the district court's decision that petitioner did not have standing to claim damages based on the fact that he would not have been able to qualify for appointment even on race-neutral grounds. *Donahue v. City of Boston*, 304 F.3d 110 (1st Cir. 2002) ("Donahue I"). Petitioner never sought review of that decision in this Court.

The First Circuit, however, remanded to the district court the question of whether petitioner was "ready and able" to accept an appointment with the Department, in light of Section 58A, sufficient for standing to seek prospective injunctive relief.[5] *Donahue I*, 304 F.3d at 121. The First Circuit also directed the district court to reevaluate petitioner's motion to amend the First Amended Complaint, because the motion to amend was no longer moot in light of the First Circuit's ruling. *Id.*

On December 20, 2002, the district court held a status conference to address the mandate from the First Circuit and subsequently issued an order granting petitioner's pending motion to amend the First Amended Complaint, which sought *solely* to add a claim to challenge the constitutionality and applicability of Section 58A. The order also permitted petitioner to file a motion for summary judgment "on the issues of the constitutionality and applicability of [Section 58A]." December 10, 2002 Order, Pet. at App. p. 49a-50a.

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5. The First Circuit held that the record was insufficient to determine whether Section 58A was then in effect or whether petitioner may have been exempted from the statute's age-based limitation.

Petitioner filed his Second Amended Complaint on December 30, 2002. The Second Amended Complaint included not only the challenge to Section 58A that was the subject of the motion to amend, but also purported to add entirely new claims of age and race discrimination made pursuant to 42 U.S.C. §§ 1983, 1985, and 1986, Mass. Gen. Laws. ch. 151B and ch. 31, Title VII, and the United States and Massachusetts Constitutions. Petitioner had not sought leave to bring any additional claims in his Second Amended Complaint besides his challenge to Section 58A. The City thereafter moved for summary judgment and/or to dismiss all claims in the Second Amended Complaint. Petitioner filed a cross-motion for summary judgment.

On June 4, 2003, the district court granted the City's motion for summary judgment finding that: (1) Section 58A's age limitation is constitutional as it is rationally related to a legitimate state interest; (2) Section 58A applied to petitioner; (3) because Section 58A applied to petitioner, he was not "ready and able" to compete for a position with the Department as he had reached the age of thirty-two before last taking the civil service examination; and thus (4) petitioner lacked standing to seek the prospective relief he desired.[6] *Donahue v. City of Boston*, 264 F. Supp. 2d 74, 87 (D. Mass. 2003). The court declined to rule on the other numerous counts in petitioner's Second Amended Complaint concluding, "this court believes that § 58A's effect on Donahue's candidacy is the only remaining issue in this case." *Id.* at 80 n.42.

On appeal of the district court's June 4, 2003 Order, the First Circuit affirmed the district court in every respect.

6. The court also concluded that Section 58A had not been repealed.

Donahue v. City of Boston, 371 F.3d 7 (1st Cir. 2004) ("Donahue II"). The First Circuit affirmed the district court's ruling that Section 58A is constitutional as it is rationally related to a legitimate state interest, that Section 58A applied to petitioner, and thus that petitioner lacked standing for prospective relief as he could not show that he was "ready and able" to accept an appointment with the Department. The First Circuit also held that the district court did not abuse its discretion in declining to decide the other issues presented in the Second Amended Complaint, ruling that those issues expanded the scope of the case beyond the issues presented on remand from *Donahue I* and raised in petitioner's motion to amend the First Amended Complaint. On September 13, 2004, petitioner filed the instant Petition with this Court.

REASONS FOR DENYING THE PETITION

Petitioner asks the Court to review the First Circuit's application of well-settled principles of law to the undisputed record of this case. Review of a writ of certiorari is not a matter of right. It will only be granted for compelling reasons — not present here — such as where a United States court of appeals has decided an important matter in conflict with another court of appeals, has decided an important federal question in a way that conflicts with a decision by a state court of last resort, or has so far departed from the course of accepted judicial proceedings as to warrant this Court's exercise of its supervisory power. Sup. Ct. R. 10(a); *Braxton v. United States*, 500 U.S. 344, 347-48 (1991) (holding the principle purpose for which the Court grants certiorari is to resolve conflicts among the United States courts of appeal and state courts regarding provisions of federal law). Moreover, a petition for a writ of certiorari will only be granted "in cases involving principles the settlement of which

is of importance to the public, as distinguished from that of the parties." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

The Petition sets forth no conflict between the decision of the First Circuit and the decision of any other court of appeals or of this Court. Nothing in the First Circuit's decision represents a departure from the standard application of garden-variety federal jurisprudence. Moreover, in light of the settled nature of the law, the issues in this case do not carry significant public importance. Rather, the Petition is driven solely by petitioner's personal interest in this case. *See Rice*, 349 U.S. at 79 (dismissing certiorari as improvidently granted). The Petition fails to meet the standards for review set forth in Supreme Court Rule 10 and should be denied.

I. The First Circuit's Decision With Respect To Petitioner's Lack Of Standing To Seek Prospective Injunctive Relief Rests On Well-Settled Principles Of Law That Do Not Conflict With The Decisions Of Any Other Court Of Appeals Or Of This Court

It is beyond dispute that a party must have standing to invoke a federal court's jurisdiction to decide the merits of a case. To establish that he has suffered an "injury-in-fact" sufficient to have standing for a claim for prospective injunctive relief, a plaintiff must demonstrate, in part, that he is "ready and able" to apply for the benefit sought. In this case, the First Circuit applied these accepted principles to a clear record of facts, none of which is genuinely in dispute. The court's decision — that petitioner lacked standing to seek prospective relief because he was not "ready and able" to apply for a position with the Department, and that Section

58A is constitutional — is consistent with the jurisprudence of the other courts of appeal and of this Court, as well as with the prior decisions of the First Circuit. Accordingly, the Petition should be denied.

A. The First Circuit Appropriately Considered Whether Petitioner Was "Ready And Able" To Challenge The Consent Decree, And Determined That He Was Not

To establish Article III standing, a plaintiff must show that he has suffered an injury-in-fact, and that it is likely, rather than speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In maintaining a claim for prospective relief, the plaintiff must demonstrate that in seeking the desired benefit: (1) he is likely to be exposed to "unequal treatment;" and (2) he is "ready and able" to apply for the benefit sought. *Texas v. Lesage*, 528 U.S. 18, 21 (1999); *Northeastern Fla. Chapter Assoc. Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993); *see also Gratz v. Bollinger*, 539 U.S. 244, 284 (2003) (to seek forward-looking relief, a party must show that it faces an imminent threat of future injury).

The issue on appeal to the First Circuit was whether petitioner was "ready and able" to compete for appointment to the Department. *Donahue II*, 371 F.3d at 13-14. Based on the clear and undisputed record, and applying the law of this Court as articulated above, the First Circuit found that petitioner had reached the age of thirty-two before taking the April 2001 examination and was therefore ineligible, pursuant to Section 58A, for appointment to the Department. *Id.* at 13-14 (citing *Jacksonville*, 508 U.S. at 666; *Gratz*, 539

U.S. at 284; and *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)). Accordingly, the court correctly held that petitioner was not "ready and able" to apply for the sought after benefit and thus lacked standing to maintain a claim for prospective injunctive relief against future application of the consent decree. *Donahue II*, 371 F.3d at 13-14, 18.

The First Circuit also correctly debunked petitioner's argument that Section 58A did not apply to petitioner because he should have been hired after he took the 1999 examination, which occurred prior to his thirty-second birthday. In other words, petitioner argued that he only became subject to Section 58A because the consent decree required him to sit for the April 2001 examination. The court reaffirmed its holding in *Donahue I* — itself based on the law as articulated by this Court[7] — that petitioner would *not* have been hired after the 1999 examination even in the absence of the consent decree because petitioner "was too far down the list to be even remotely considered for hiring." *Donahue II*, 371 F.3d at 13-14 (quoting *Donahue I*, 304 F.3d at 117). Thus, the First Circuit correctly held that "Donahue was not entitled to an appointment prior to the enactment of § 58A and would have been subject to the statute's age restrictions in April 2001 even under a race-neutral hiring policy." *Donahue II*, 371 F.3d at 14. Nothing in the First Circuit's decision conflicts with the decisions of the other courts of appeal or of this Court.

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7. *See Donahue I*, 304 F.3d at 116-17 (relying on *Texas v. Lesage*, 528 U.S. 18, 21 (1999)). Petitioner never sought review of *Donahue I* in this Court.

B. The First Circuit Appropriately Analyzed Whether The Massachusetts Legislature Had a Rational Basis For The Age Limitation In Mass. Gen. Laws ch. 31, § 58A, And Determined That It Did

Age, unlike race, is not a suspect classification under the Equal Protection Clause of the Fourteenth Amendment. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000). States may discriminate on the basis of age under the Fourteenth Amendment as long as the age classification is rationally related to a legitimate state interest. *Id.* at 83. Specifically, an age classification is permissible so long as the state articulates some "reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). The party challenging the constitutionality of the age classification bears the burden of negating "every conceivable basis which might support it." *Beach Communications*, 508 U.S. at 315. As this Court has explained, "we will not overturn such [government action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

Applying the standard as articulated by this Court, the First Circuit correctly determined that petitioner failed to meet his burden of establishing that Section 58A is not rationally related to a legitimate state interest. *Donahue II*, 371 F.3d at 14-17 (citing, among other cases, *Kimel*, 528 U.S. at 83; and *Beach Communications*, 508 U.S. at 313). The court considered the uncontested, sworn testimony from representatives of the Department that it supported the City's adoption of Section 58A because the age limitation

encouraged a long-term commitment to the Department, ensured the physical fitness of its officers, and reduced the strain on the Department's pension system. *Donahue II*, 371 F.3d at 16. The court concluded that petitioner did not even attempt to discredit the legitimacy of these justifications but, rather, conceded that they evidenced a legitimate purpose.[8] *Id.* Moreover, the court correctly held that contrary to petitioner's argument, as a matter of law, it made no difference whether the City actually relied on the reasons offered by the Department in adopting Section 58A.[9] *Id.* (citing *Beach Communications*, 508 U.S. at 315).

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8. There is abundant case law establishing that age limits on government positions similar to the limit challenged here have a rational basis. Petitioner fails to address any of these cases in his brief or to show that the First Circuit's decision conflicted with that of any other court of appeals or of this Court. *See, e.g., Thomas v. U.S. Postal Inspection Serv.*, 647 F.2d 1035, 1036 (10th Cir. 1981) (upholding an age limit of thirty-four for hiring postal inspectors); *Arritt v. Grisell*, 567 F.2d 1267, 1272 (4th Cir. 1977) (upholding age limit of thirty-five for hiring new police officers); *Sobieralski v. City of South Bend*, 479 N.E.2d 98, 100-01 (Ind. Ct. App. 1985) (same); *Figueroa v. Bronstein*, 38 N.Y.2d 533, 534-35 (N.Y. 1976) (per curiam) (same with regard to an age limit of thirty-two), *appeal dismissed for want of a substantial federal question by Figueroa v. Director of New York City Dep't of Personnel*, 429 U.S. 806 (1976); *Ridaught v. Division of Fla. Highway Patrol*, 314 So. 2d 140, 144 (Fla. 1975) (same with regard to an age limit of thirty-five); *cf. Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (holding that a Massachusetts statute mandating the retirement of uniformed police officers at age fifty survives rational-basis scrutiny).

9. In attempting to show that Section 58A has no rational basis, petitioner never challenges the actual bases for the statute (and concedes that these are correct), but rather offers entirely unsupported allegations regarding the effects of the application of

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The First Circuit also correctly determined that Section 58A does not have an "invidious discriminatory purpose" or a "disparate impact" that would require application of strict scrutiny review to the constitutionality of Section 58A. *Donahue II*, 371 F.3d at 14-16. The court held that Section 58A "has an identical effect on minorities and non-minorities competing for a position with the [Department]" because "[a]nyone who has reached the age of thirty-two on the day of the applicable civil service examination is precluded from seeking an original appointment, regardless of his or her race." *Id.* at 15. Likewise, petitioner's argument that the combined effect of Section 58A and the consent decree evidenced a disparate impact was fallacious because, "[i]f some minorities were no longer seeking an original appointment at the time of the April 2001 examination because they had already been hired by the [Department], this was in no way a consequence of § 58A." *Id.*[10] Numerous

(Cont'd)

Section 58A. For instance, petitioner alleges — with absolutely *no* proof — that "a vast majority of those hired each year are not subject to the age 32 hiring limitation at all" because "most people hired by the Department have a military preference that excludes the age 32 limitation." Pet. at p. 26. Other allegations, such as, "fully one-third of police hires are . . . from the cadet program, which does not have an age 32 limitation" are flat out wrong and misstate the very factual record below. *Id.* Indeed, police cadets *are* subject to the age restriction. Callahan Aff. V, ¶ 3, App. p. 3a. Because petitioner's allegations have no support or are simply wrong, petitioner never offered any court a basis upon which to hold in his favor and certainly offers no basis for this Court to grant review of this case.

10. Attempting to bolster his erroneous argument that the First Circuit should have applied the "strict scrutiny" standard to its review of the constitutionality of Section 58A, petitioner argues that a

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minority and non-minority candidates who were on the eligible list for the 1999 examination were not hired — and would not have been hired even absent the consent decree. *See* First Affidavit of Edward P. Callahan dated May 30, 2001 ("Callahan Aff. I"), ¶ 75, App. p. 1a. All of those individuals, including many minorities, were equally subject to Section 58A's age limitation when they took the 2001 examination. Accordingly, Section 58A applied as a general age prohibition

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(Cont'd)

facially-neutral statute, such as Section 58A, is automatically subject to strict scrutiny once a "disparate racial impact" is shown. Pet. at 21 n.7. None of cases to which petitioner cites, however, advance his cause. *See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977); *Washington v. Davis*, 426 U.S. 229, 239-40 (1976). Those cases stand for nothing more than proof of a statute's racially-disparate impact can be evidence of an invidious discriminatory purpose in enacting the statute, but say nothing about automatic application of the strict scrutiny standard upon a showing of disparate impact. Even if petitioner's articulation of the rule in these cases was correct (which it is not), such a rule would not apply here, because — as the First Circuit found — petitioner has utterly failed to provide any proof that Section 58A has a disparate impact on non-minorities.

In an equally specious argument, and misinterpreting this Court's decision in *Keyes v. School District No. 1*, 413 U.S. 189 (1973), petitioner argues that the City has the burden of showing that race was *not* the motivating factor behind enacting Section 58A. Pet. at 24-25. *Keyes*, however, merely stands for the proposition that once racial discrimination is *proved* (i.e., by the plaintiff), the burden shifts to the defendant to prove that racial discrimination was not intended. *Keyes*, 413 U.S. at 208. Petitioner has not provided *any* proof that Section 58A discriminated on the basis of race, and therefore, neither *Keyes* nor any of the other cases cited by petitioner suggests that strict scrutiny should have been applied to the First Circuit's review of Section 58A.

against non-minorities and minorities, and thus, could not have caused "disparate impact" against non-minorities on the basis of their race. *Donahue II*, 371 F.3d at 15.

As set forth above, the First Circuit's analysis that petitioner was not "ready and able" to accept a position with the Department in light of Section 58A's age limitation, that petitioner failed to meet his burden of establishing that Section 58A is not rationally related to a legitimate state interest, and that precedent did not require application of the strict scrutiny standard to Section 58A, was unimpeachable. Nothing in the First Circuit's analysis conflicts with the decisions of the other courts of appeal of this Court, and nothing justifies review by this Court.

II. The First Circuit's Decision Affirming The District Court's Discretion To Limit The Scope Of Petitioner's Second Amended Complaint Is Not Suitable For Review Because It Does Not Conflict With A Decision Of Any Other Court Of Appeals Or Of This Court, Nor Does It Present A Question Of Public Importance

Review of a writ of certiorari is not a matter of right. It will only be granted for compelling reasons (not present here), *see* Sup. Ct. R. 10(a); *Braxton*, 500 U.S. at 347-48, and in cases involving the settlement of questions of public importance, rather than of importance solely to the parties. *Rice*, 349 U.S. at 79. This case does not present *any* compelling reason for the Court to grant review. As explained below, the First Circuit applied, to a clear record of facts, the well-established principles that grant considerable discretion to a district court in deciding whether and how to allow a party to amend its pleadings. The First Circuit's decision — that the district court did not abuse its discretion

in declining to expand the scope of petitioner's Second Amended Complaint beyond his challenge to Section 58A — is consistent with the jurisprudence of the courts of appeal and of this Court. Furthermore, the decision does not involve "principles the settlement of which is of importance to the public" but relates solely to an issue of importance to petitioner alone. Accordingly, the Petition should be denied.

A. The First Circuit Appropriately Analyzed Whether The District Court Abused Its Discretion In Declining To Allow Petitioner To Expand The Scope Of His Second Amended Complaint, And Determined That It Did Not

A party may amend its pleadings — once the adverse party has served a responsive pleading — only by leave of court or by written consent of the adverse party. Fed. R. Civ. P. 15(a). A district court has considerable discretion to decide whether to allow an amendment to the pleadings, and an appellate court will overturn the district court's decision only where there is a clear abuse of discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *Foman v. Davis*, 371 U.S. 178, 182 (1962). A district court is not required to grant leave to amend sua sponte when the requesting party never requested leave of court to add the claims at issue. *See, e.g., U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 241-42 (1st Cir. 2004), *cert. denied*, __ S. Ct. __, 2004 WL 2056165 (U.S. Oct. 4, 2004) (No. 03-1690); *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) (en banc); *Johnson v. Fowler White Burnett, P.A.*, No. 04-20045 Civ., 2004 WL 1553498, at *1 (S.D. Fla. 2004); *see also B&J Crane and Rigging, Inc. v. Beker Resources Corp.*, 587 F.2d 1065, 1068 (10th Cir. 1978) (holding no abuse of discretion where district

court declined to hear issue that was neither pleaded, briefed, nor tried).

The First Circuit properly determined that the district court did not abuse its discretion by refusing to consider the various claims that petitioner sought to include in his Second Amended Complaint without first seeking leave of court to add those claims and after ignoring ample opportunity to apprise the district court of his intention to add them. Analyzing the record on which the district court based its decision, the First Circuit noted that on remand, petitioner's motion to amend the First Amended Complaint: (1) sought only to add a constitutional challenge to Section 58A; and (2) in no way referenced or sought leave to add the panoply of claims, including a claim under Title VII,[11] that appeared in petitioner's Second Amended Complaint. *Donahue II*, 371 F.3d at 17.[12]

In addition, the First Circuit noted that during the status conference held by the district court to address the scope of

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11. In these additional claims, petitioner sought relief pursuant to 42 U.S.C. §§ 1983, 1985, and 1986, Mass. Gen. Laws. ch. 151B, and ch. 31, Title VII, the United States and Massachusetts Constitutions, and the doctrine of equitable estoppel.

12. These types of failures on petitioner's part are just the types of deficiencies that numerous other courts of appeal have found constitute ample justification for denying a motion for leave to amend the pleadings. *See, e.g.*, *Karvelas*, 360 F.3d at 241-42 (holding denial of opportunity to amend sua sponte not abuse of discretion); *Wagner*, 314 F.3d at 542 (holding same); *B&J Crane*, 587 F.2d at 1068 (holding no abuse of discretion where district court declined to hear issue that was neither pleaded, briefed, nor tried); *Ford Motor Credit Co. v. Bright*, 34 F.3d 322, 324-25 (5th Cir. 1994) (holding no abuse of discretion where plaintiff failed to seek leave to amend).

the case on remand, petitioner never mentioned new claims other than his proposed challenge to Section 58A and did not object when respondents' attorney framed the issues on remand as being limited to consideration of the effect of Section 58A upon petitioner. *Id.* Furthermore, the First Circuit noted that the district court's order issued at the conclusion of the status conference did not invite the addition of other claims not discussed during the conference but that might occur to petitioner later.[13] *Id.* Finally, the First Circuit properly rejected petitioner's erroneous argument that *Donahue I* had granted petitioner an open-ended invitation to amend. The *Donahue II* court explained that in *Donahue I*, it had merely directed the district court to reconsider, in its discretion, petitioner's motion to amend his First Amended Complaint. *Donahue II*, 371 F.3d at 16. The court concluded "[a]lthough we observed that Donahue might have advanced

13. Petitioner offers only unfounded conjecture in support of his theory that the district court intended to provide him with a carte blanche to add any claims he wanted as part of his Second Amended Complaint. For instance, petitioner infers that the district court intended to give him a carte blanche because in granting petitioner's motion to amend, the district court did not explicitly prohibit him from adding new claims. Pet. at p. 9. This argument makes no sense. The district court could not have prohibited that which it had no idea petitioner planned to do. Moreover, any inference that the district court had accepted petitioner's Second Amended Complaint in its entirety when it suggested that petitioner certify certain questions to the Massachusetts Supreme Judicial Court is belied by the fact that the district court subsequently ruled against expanding the scope of the case to allow the surprise new claims. *See, e.g., Castro v. United States*, 540 U.S. 375, 124 S. Ct. 786, 793 (2003) (holding district court not bound by its own prior decision under "law of the case" doctrine). Petitioner's inference-based argument reaches spurious conclusions and offers nothing that would support the claim that the district court later abused its discretion in declining to expand the scope of petitioner's Second Amended Complaint.

a claim under Title VII, we certainly did not require the district court sua sponte to consider, let alone allow, the addition of that or other new claims that were not raised in a motion to amend." *Id.* at 17.

The First Circuit's analysis of whether the district court abused its discretion by declining to expand the scope of petitioner's Second Amended Complaint is unassailable. Nothing in the Petition suggests that the First Circuit's decision conflicts with the decisions of any other court of appeals or of this Court. Moreover, nothing in the Petition suggests that this presents an issue important to the general public as opposed to petitioner alone. Therefore, nothing presented by petitioner justifies review of this question by the Court.

B. None Of The Other Arguments Petitioner Makes That The First Circuit Should Have Fully Allowed His Second Amended Complaint Provides A Basis For The Court To Grant Review Of This Case

1. Petitioner argues that the First Circuit improperly ignored his Title VII claim, which it did not

Petitioner's Title VII claim — to the extent that it even existed — would have been untimely. The statute of limitations for a Title VII claim begins to run upon the occurrence of the purportedly unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1). As this Court has ruled, the statute of limitations is triggered as soon as a plaintiff is on notice of the alleged harm. *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (holding college's notice of denial of tenure triggered statute of limitations under Title VII); *Chardon v.*

Fernandez, 454 U.S. 6, 8 (1981) (per curiam) (holding same). The alleged "harm" in this case occurred on September 1, 2001, when HRD created the eligible list from the April 2001 examination and excluded petitioner from that list because of his age, as required by Section 58A.[14] At the latest, petitioner learned that he had been excluded from the eligible list because of his age on October 15, 2001, when the City filed the Second Affidavit of Edward P. Callahan in this case.[15] *See* Second Affidavit of Edward P. Callahan dated October 15, 2001 ("Callahan Aff. II"), ¶ 10, App. p. 2a. Petitioner did not take action on his Title VII claim until December 30, 2002 — 261 days after the 180-day statute of limitation on his Title VII claim expired.[16]

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14. To the extent that petitioner asserts that his Title VII claim arises from his failure to be hired as a result of his score on the 1999 examination, his claim is clearly time-barred, as petitioner was aware of the "harm" no later than May 10, 2000, when he filed his original complaint.

15. To the extent that petitioner claims he was unaware of Section 58A when he took the 2001 entrance examination, this does not toll the statute of limitations because the City did not "actively conceal" the existence of Section 58A, but rather, voluntarily made efforts to notify all applicants for the 2001 police entrance examination, such as petitioner, about the age limitation. *See* Fourth Affidavit of Edward P. Callahan dated February 13, 2003 ("Callahan Aff. IV"), ¶¶ 5-6, App. pp. 2a-3a.

16. The First Circuit recognized that petitioner could have tried to raise a Title VII claim prior to the issuance of its decision in *Donahue I*. The court stated: "[I]t is noteworthy that Donahue did not assert a claim of race discrimination under Title VII. . . . But as Donahue made no claim under Title VII, we need not consider its implications for his standing to sue." *Donahue I*, 304 F.3d at 117 n.6.

Therefore, petitioner's claim would have been time barred.[17]

Furthermore, petitioner's Title VII claim has not been equitably tolled. Equitable tolling should be applied "sparingly," and there are absolutely no facts that would justify the application of that doctrine to this case. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). Petitioner's assertion that the City actively misled petitioner and the lower courts to believe that no lower-scoring minorities were ever advanced over petitioner is false. Indeed, when the City came into the possession of the relevant test scores, the City acknowledged that one minority with a lower score than petitioner was hired, and the City has *never* represented anything to the contrary in any filing to the district court or the First Circuit.

Nor is petitioner entitled to equitable tolling based on an alleged "continuing effect" of Section 58A. Pet. at pp. 17-20. In *Morgan*, the Court ruled that the Title VII statute of limitations for an alleged discrete act of discrimination — such as the refusal to hire at issue here — begins to run

17. Petitioner's claim under Mass. Gen. Laws. ch. 151B, the Massachusetts Civil Rights Act, is also time-barred because petitioner filed his claim on December 30, 2002, well after expiration of the 6-month statute of limitation, which began to run, at the latest, on October 15, 2001. The 300-day statute of limitation, in place as of August 7, 2002, only applies to claims that "arose" after November 5, 2002, which petitioner's did not. *See* 2002 Mass. Acts ch. 223. Finally, petitioner incorrectly asserts that a 3-year limitations period should apply to his Chapter 151B claim. Pet. at p. 13, n.2. Petitioner did not file his claim with the Massachusetts Commission against Discrimination within six months of the purported discriminatory act as required for the 3-year limit to apply. *See* Mass. Gen. Laws. ch. 151B, § 5.

upon the occurrence of the purportedly unlawful act, and that a "continuing violation" can be found *only* when allegedly repeat conduct does *not* occur *on any particular day*. *Morgan*, 536 U.S. at 114-15. The alleged "harm" in this case, however, did occur on a particular day — namely, on September 1, 2001, when HRD created the April 2001 examination eligible list without petitioner's name. Accordingly, the statute of limitations began to run then (or at the latest on October 15, 2001, when petitioner learned his name was not included on that list) and thus had expired before petitioner ever acted on his purported claim.[18]

Finally, petitioner's Title VII argument is simply without merit. Petitioner rests his Title VII claim on a mischaracterization of the First Circuit's holding in *Donahue I*, in which the First Circuit found that petitioner would "likely" have received an appointment to the Department based on his 1999 examination score *if* he were a minority. *Donahue I*, 304 F.3d at 120. Latching onto this language,

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18. Petitioner has failed to substantiate any other of his arguments that the statute of limitation has been equitably tolled. Petitioner's argument that equitable tolling applies because Section 58A was applied to other candidates to the Department who took the 2001 examination, and will be applied to candidates who take future civil service examinations, would render statutes of limitation meaningless because any individual who had suffered alleged adverse treatment could argue that the violation is on-going, and the statute tolled, until it is cured as to all others who potentially might have a claim. This argument is inconsistent with Congress's intent in enacting a short limitations period for Title VII claims, "to encourage the prompt processing of all charges of employment discrimination." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). Furthermore, petitioner fails to provide any support for his argument that equitable tolling applies because the City took a "new employment action" during the pendency of the litigation.

petitioner jumps to the erroneous conclusion that the First Circuit held petitioner could obtain declaratory relief under Title VII. Pet. at p. 14. Contrary to petitioner's assertion, however, *Donahue I* did *not* hold that petitioner had a meritorious Title VII claim. The First Circuit only referenced Title VII in dictum, in the context of concluding that petitioner lacked standing to allege damages as a result of the consent decree because he would never have been appointed to the Department even in a race-neutral setting. The court made observations regarding Title VII for the *sole* purpose of pointing out that petitioner might have been able to establish *standing* under Title VII more easily than under Section 1983 because Title VII has a less stringent definition of "injury." The *Donahue I* court, however, did *not* rule on any hypothetical Title VII claim. *Donahue I*, 304 F.3d at 117 n.6.

Indeed, had petitioner's Title VII claim, or any of the other claims included in petitioner's Second Amended Complaint, actually come before the First Circuit for consideration on their merits, it is virtually certain that the court would have decided against petitioner on all of his theories. Since he took the 1999 examination, petitioner has been incapable of showing that a decision striking down the consent decree on any grounds would provide him with an appointment with the Department.[19] Therefore, petitioner

19. In *Donahue I*, the First Circuit held that petitioner's score on the 1999 examination would not have made him eligible to receive an appointment to the Department even under race-neutral standards. Accordingly, even absent the consent decree he still would have been forced to sit for the 2001 examination to seek admission. However, because Section 58A was implemented before petitioner took the 2001 examination, and because petitioner reached his thirty-second (Cont'd)

could not show, as required to demonstrate standing, that it was likely, rather than speculative, that his injury would be redressed by a favorable decision.[20] *Lujan*, 504 U.S. at 560-61.

(Cont'd)

birthday prior to taking the 2001 examination, he would not have been eligible for appointment based on his 2001 examination score even absent the consent decree. Therefore, petitioner did not have standing in 1999, nor does he today, to challenge application of the consent decree, whether he had brought such a claim pursuant Title VII, Chapter 151B, or the United States or Massachusetts Constitutions. Petitioner's argument that he suffered "disparate treatment" also fails for this reason. Pet. at p. 14. To establish disparate treatment under Title VII, the claimant must show, in pertinent part, that he was *qualified* for the position for which he applied. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Because petitioner's test score was insufficient to make his eligible for appointment after the 1999 examination, and because petitioner's age was insufficient to make him eligible after the 2001 examination, petitioner cannot show that he was ever qualified for the position for which he applied.

20. Petitioner's Chapter 151B claim also fails because petitioner ignores the fact that Chapter 151B does not protect individuals, like petitioner, who are under age 40. *Mitchell v. TAC Technical Serv., Inc.*, 50 Mass. App. Ct. 90, 92 (2000). Furthermore, to the extent that petitioner claims that Section 58A is a proxy for race discrimination, petitioner has not offered any proof of the City's purported discriminatory intent, motive, or state of mind sufficient to carry his burden and support a judgment in his favor. *See Matthews v. Ocean Spray Cranberries, Inc.*, 426 Mass. 122, 127 (1997).

2. Petitioner argues that the First Circuit improperly ignored his retaliation claim under 42 U.S.C. § 1983, which it did not

Petitioner has failed to state a retaliation claim under Section 1983 because he has failed to allege a violation of a constitutionally-protected right, as defined by this Court, in connection with this claim. *See, e.g., West v. Atkins*, 487 U.S. 42, 48 (1988) (stating elements of Section 1983 claim). As a matter of law, petitioner does not have a right to an appointment to the Department, let alone a constitutionally protected one. *Board of Regents of State Coll. v. Roth*, 408 U.S. 564, 577 (1972); *Boston Police Superior Officers Fed'n v. City of Boston*, 147 F.3d 13, 24 (1st Cir. 1998) (no property interest under Massachusetts law to police department position).[21]

21. Petitioner has failed to proffer any admissible evidence to support a claim of "retaliation" under 42 U.S.C. § 1983. Petitioner falsely alleges that around November 2001, a representative in the Mayor's office, told members of the purportedly "similarly situated class" that the Mayor would not authorize an exemption from Section 58A for the 2001 examination applicants because of this litigation. The Mayor's representative testified in a sworn affidavit that *she was not aware of this litigation until 2003*. Affidavit of Amy E. Dwyer dated April 11, 2003, ¶ 4, App. p. 1a. Furthermore, petitioner's ancillary argument that the exemption of certain firefighters from Section 58A was no different than the proposed exemption for the police officers is also false. The exemption for firefighters applied to those that took and passed the *April 29, 2000* examination and thus were on the eligible list before Section 58A was adopted. In contrast, *Section 58A had been adopted* at the time that applicants to the police department took the April 2001 examination. Once hiring was under way from the 2001 examination based on an eligible list that excluded candidates age 32 and over, it would have been administratively difficult and costly, in late 2001, to provide the exemption. Callahan Aff. V, ¶ 7, App. p. 4a. Thus, the Mayor had a legitimate, non-invidious motive for not approving the November 28, 2001 home rule petition.

Petitioner's proposed claims were untimely or without merit. Justice did not require the First Circuit to allow petitioner to expand the scope of this case to include the putative claims that he sought to raise in his Second Amended Complaint. Accordingly, petitioner does not present any basis for this Court to grant review of these issues.

CONCLUSION

That the Petition presents nine unfocused questions for review is proof by itself that petitioner cannot identify a single issue worthy of review on certiorari. *See* Supreme Court Rule 14.1(a); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 858 (1999) (Stevens, J., dissenting) ("[t]he most helpful and persuasive petitions for certiorari to this Court usually present only one or two issues, and spend a considerable amount of time explaining why those questions of law have sweeping importance and have divided or confused other courts"). Because the remainder of the Petition does no better job in identifying any extraordinary circumstances that would merit certiorari review in this Court, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS FROM RELATED AFFIDAVITS

The following are the excerpts from the affidavits cited in respondent's opposition:

Affidavit of Amy E. Dwyer dated April 11, 2003:

> ¶ 4: I recall that the Mayor's Office received a number of calls from individuals regarding the status of the home rule petition passed by the City Council of November 28, 2001. I spoke to some of those individuals by telephone. It would have been impossible for me to have referenced the above-captioned litigation in any of those conversations because I was not aware of the case at the time. In fact, I only become aware of the case in the last month.

First Affidavit of Edward P. Callahan dated May 30, 2001 ("Callahan Aff. I"):

> ¶ 75: In my almost fifteen years experience overseeing the Department's hiring of student officers, and as is demonstrated in this case, the Department has generally been able to hire one person for every three persons listed on an eligible list. Thus, approximately twenty-one candidates would have been considered to hire the seven spots filled by *Castro v. Beecher* candidates. Because of this, I can state with complete certainty that Mr. Donahue would not have been chosen to fill one of the seven non-statutory preference/language skill positions if the *Castro v. Beecher* consent decree did not apply to the Department's hiring from the March 1999 examination.

Appendix A

Second Affidavit of Edward P. Callahan dated October 15, 2001 ("Callahan Aff. II"):

> ¶ 10: Because Mr. Donohue turned 32 prior to taking the entrance examination on April 26, 2001, he is ineligible to become a police officer with the City of Boston.
>
> ¶ 17: As part of this litigation, the HRD provided the parties with the actual names of test takers and their scores. I have reviewed this list. According to the records provided by the HRD, five of the seven minority student officers appointed to the March 5, 2001, class had exam scores higher than that of Bradley Donahue. One of the minority officers had a score equal to that of Bradley Donahue. Finally, one of the minority test takers scored one-point lower than Mr. Donohue. The scores of the seven minority officers ranged from 95-99. Bradley Donahue scored 96. Thus, all members of the March 5, 2001, class, except one person, had either statutory preference or a test score greater than or equal to that of Bradley Donohue.

Fourth Affidavit of Edward P. Callahan dated February 13, 2003 ("Callahan Aff. IV"):

> ¶ 5: The City of Boston and HRD made every effort to notify individuals that certain towns and municipalities had accepted the provisions of Chapter 242. HRD sent a notice to all individuals

who were registered for the April 2001 examination informing them that they should verify whether or not the city or town for which they wanted to work had adapted the age restriction. HRD offered to reimburse any candidate for the examination fee if the individual was too old to be hired by the city or town for which they wanted to work.

¶ 6: The City of Boston made it very clear in its recruitment literature that the City was in the process of adopting, or had already adopted, the age thirty-two restriction. The City of Boston created and distributed thousands of posters and tens of thousands of brochures to advertise the entrance examination. The literature included information regarding the new age limitation. In addition, upon information and belief, the City of Boston's adoption of the age thirty-two restriction was reported in the local newspapers.

Fifth Affidavit of Edward P. Callahan dated April 14, 2003 ("Callahan Aff. V"):

¶ 3: To enter Boston's cadet program, an individual must be at least 18 years of age, and may not be older than 25 years of age. In addition, because cadets must take the civil service entrance examination to obtain an appointment to the Department, the Department considers that appointment as a police officer to be an "original" appointment. The Department will not appoint a cadet to the police academy who is older than 32 years old.

Appendix A

¶ 7: I am aware that in November 2001 the Boston City Council passed a home rule petition that would have exempted from G.L. c. 31 § 58A individuals who took the April 2001 entrance examination. I am also aware that the home rule petition was never enacted into law. Once hiring was under way from the 2001 examination based on an eligible list that excluded candidates age 32 and over, it would have been administratively difficult and costly, in late 2001, to adjust the hiring process to include candidates seeking an "original appointment" who exceeded the maximum age limit for appointment.

APPENDIX B — STATUTE INVOLVED

Mass. Gen. Laws. ch. 31, § 58A:

Chapter 31: Section 58A Municipal police officers and firefighters; maximum age restrictions

Section 58A. Notwithstanding the provisions of any general or special law to the contrary, in any city, town or district that accepts this section, no person shall be eligible to have his name certified for original appointment to the position of firefighter or police officer if such person has reached his thirty-second birthday on the date of the entrance examination. Any veteran shall be allowed to exceed the maximum age provision of this section by the number of years served on active military duty, but in no case shall said candidate for appointment be credited more than four years of active military duty.